HAROLD and DORIS WARSHAY --

Docket No. 30312-91

Wednesday, October 6, 1993

Judge David Laro

BENCH OPINION

THE COURT: The Court has decided to render oral findings of fact and opinion in this case, Docket Number 30312-91, and the following represent the Court' oral findings of act and opinion.

This bench opinion is made pursuant to the authority granted by Section 7459(b) of the Internal Revenue Code of 1986, as amended to date, and Rule 152 of the Tax Court Rules of Practice and Procedure.

Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years in issue and all rule references are to the Tax Court Rules of Practice and Procedure.

Respondent determined deficiencies in and additions to Petitioners' federal income tax as follows:

For the year 1979, deficiency $46,501; a Section 6651(a)(1) amount of $3,617; a Section 6653(a)(1) amount of $2,398.

For 1980, the deficiency was $29,753 and the Section 6651(a)(1) addition was $7,438, the Section 6653(a)(1) addition was $2,308.

For 1981, the deficiency was $4,413, the addition to tax under Section 6653 (a)(1) was $1,145, and under Section 6651(a)(1) the amount is 50 percent of the interest due on the deficiency.

For 1982, the deficiency was $17,639 and the addition to tax under Section 6653(a)(1) was $882, and under Section 6651(a)(1) the amount is 50 percent of the interest due on the deficiency.

This case is before the Court pursuant to a petition filed by Harold Warshay and

Doris Warshay for redetermination of Respondent's determination of deficiency.

Although both Harold Warshay and Doris Warshay are Petitioners, for simplicity the word "Petitioner" in the singular will be used to refer to Harold Warshay.

The sole issue or decision is whether Petitioner entered into an oral agreement immunizing him from the tax liability Respondent determined.

Petitioner purportedly entered into such and [sic] agreement with Charles Brennan (Brennan), District Director of the Manhattan District of the Internal Revenue Service (IRS), and Raymond Turner (Turner), IRS Assistant Regional Commissioner for Criminal Investigations in the North Atlantic Region.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulations and exhibits attached thereto are incorporat-

ed herein by reference. Petitioner and Doris Warshay are husband and wife. At the time they filed their petition they resided in Port Washington, New York.

Petitioner was employed by John Muir and Company (Muir) in 1980. Hans Reinisch (Reinisch), another Muir employee, became concerned with securities trading irregularities he observed in the course of his employment. Reinisch contacted the Securities and Exchange Commission (SEC).

In response to the request of the SEC, Reinisch sought the corroboration of other Muir employees and enlisted the aid of Petitioner. Reinisch took Petitioner to meet with various representatives of the SEC.

Eventually Reinisch contacted the Internal Revenue Service (IRS). Reinisch and Warshay assisted the SEC and IRS for approximately four years during which

time the Office of the United States Attorney also participated in the investigation.

At various times Petitioner and Reinisch met with Linda Cassano, Special Counsel to the SEC; Donald Malawsky, Deputy Regional Administrator of the SEC; Peter Quigley, an SEC investigator; Pamela Chepiga of the United States Attorney's Office; Mark Sirkin, a special agent with the IRS Criminal Investigation Division; Daniel Kornblatt, an IRS agent, and others.

Before trial, Petitioner stipulated that (1) there was no written agreement between Petitioner and IRS providing for any beneficial tax treatment for Petitioner; (2) Petitioner and the IRS did not enter into a closing agreement under Section 7121 or compromise agreement under Section 7122 for any or all of the taxable years in issue; (3) No government

agency aside from the IRS made Petitioner any promise of civil tax immunity; (4) Respondent's determinations are technically correct.

Petitioner's sole argument is that Brennan and Turner made oral promises to protect Petitioner from civil tax liability and Respondent is equitably estopped from denying this oral agreement.

OPINION

Petitioner alleges that he was orally granted civil tax immunity with respect to the taxes in issue in return for his assistance in the criminal investigation against the SEC and the IRS [sic]. Petitioner bears the burden of proof. Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933).

Petitioner has failed to establish the existence of an oral agreement between Petitioner and either, Brennan, Turner or both, that would protect Petitioner from

civil tax liability. Accordingly, we sustain Respondent's determination in full.

In this regard, we note that Petitioner relies solely on his claim of immunity and has presented no other evidence otherwise challenging Respondent's determination.

Because Petitioner has not proven the existence such an agreement, we need not determine whether such a promise, if it had been made, would be binding on Respondent.

However, we note that closing agreements under Section 7121 and compromise agreements under Section 7122 are the exclusive means for the IRS to settle civil tax liabilities. Botany Worsted Mills v. United States, 278 U.S. 282, 288 (1929); Estate of Meyer v. Commissioner, 58 T.C. 69, 70 (1972); Rudisill v. Commissioner, T.C. Memo 1992-388.

Both closing agreements and compromise agreements are required to be in writing. Sections 301.7121-1 and 301.7122-1, Procedural and Administrative Regs; Rudisill v. Commissioner, supra. Thus, contrary to their claim, Petitioner cannot bind the IRS to an alleged oral agreement to compromise civil tax liability.

Petitioner argues that an oral agreement, although not binding in and of itself, would estop the government from denying Petitioner the civil tax immunity allegedly promised to him. In Botany Worsted Mills v. United States, supra at 289, the United States Supreme Court explicitly left open the question when an oral agreement, not binding in and of itself, may become binding on the parties by estoppel.

The factors necessary for a court to find such an agreement binding by estoppel are:

(1) a misrepresentation by an agent of the United States acting within the apparent scope of his duties; (2) the absence of contrary knowledge by the taxpayer in circumstances where he may reasonably act in reliance; (3) actual reliance; (4) detriment; and (5) a factual context in which the absence of equitable relief would be unconscionable. Tonkonogy v. United States, 417 F. Supp. 78, 79 (S.D.N.Y. 1976). Because of our disposition of the case, we need not determine whether the elements of estoppel were met. However, we note that although Petitioner established the element of detriment, he did not present credible evidence on the other elements of equitable estoppel.

To reflect the foregoing, decision will be entered for Respondent.

This concludes the Court's oral findings of fact and opinion.

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

HAROLD and DORIS WARSHAY,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 30312-91

O R D E R

For cause, it is

ORDERED that the Court's decision entered in this case on November 15, 1993, is hereby vacated and set aside. It is further

ORDERED that the Court's oral findings of fact and opinion are amended in that page 2, lines 2 and 5 are corrected as follows:

(line 2) addition to tax under section 6653(a)(1) was $1,145, and under section 6653(a)(2) the

(line 5) addition to tax under section 6653(a)(1) was $882, and under section 6653(a)(2) the

In all other respects the Court's oral findings of fact and opinion dated October 6, 1993, remain in full force and effect.

/s/ David Laro

Judge

Dated: Washington, D.C.

November 29, 1993

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

HAROLD and DORIS WARSHAY,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 30312-91

O R D E R

For cause, it is

ORDERED that the Court's decision entered in this case on November 29, 1993, is hereby vacated and set aside. It is further

ORDERED that the Court's Order dated November 29, 1993, is amended in that the page number in the second "ORDERED" paragraph is changed from page 2 to page 3. It is further

ORDERED that the Court's oral findings of fact and opinion are amended in that a new paragraph is being added on page 3, following line 6, as follows:

> Respondent also determined that the underpayment of federal income taxes for each year was substantial and attributable to tax-motivated transactions within the meaning of section 6621(c), formerly section 6621(d). Accordingly, respondent determined that petitioners are liable for interest accruing after December 31, 1984, at 120 percent of the interest rate established by section 6621(b).

In all other respects the Court's oral findings of fact and opinion dated October 6, 1993, remain in full force and effect.

/s/ David Laro

Judge

Dated: Washington, D.C.

December 7, 1993

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

HAROLD and DORIS WARSHAY,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 30312-[illegible].

DECISION

Pursuant to the opinion of the Court as set forth in the pages of the transcript of the proceedings before Judge David Laro at New York, New York, on October 6, 1993, containing his oral findings of fact and opinion, it is

ORDERED AND DECIDED: That there are deficiencies in and additions to petitioners' Federal income tax as set forth below:

1979: $46,501 (Deficiency); $3,617 (Sec. 6651(a)(1)); $2,398 (Sec. 6653(a)(1)); $0 (Sec. 6653(a)(2)).

1980: $29,753 (Deficiency); $7,438 (Sec. 6651(a)(1)); $2,308 (Sec. 6653(a)(1)); $0 (Sec. 6653(a)(2)).

1981: $4,413 (Deficiency); $0 (Sec. 6651(a)(1)); $1,145 (Sec. 6653(a)(1)); * (Sec. 6653(a)(2)).

1982: $17,639 (Deficiency); $0 (Sec. 6651(a)(1)); $882 (Sec. 6653(a)(1)); * (Sec. 6653(a)(2)).

* This amount is 50 percent of the interest due on the deficiencies of $4,413 and $17,639 for the taxable years ended December 31, 1981, and 1982, respectively.

It is further

ORDERED AND DECIDED: That petitioners are liable pursuant to section 6621(c), formerly section 6621(d), for increased interest on the above deficiencies accruing after December 31, 1984. That int-

erest is 120 percent of the interest rate established by section 6621(b).

/s/ David Laro

Judge

Entered: December 8, 1993